Scavone v Campbell Meadows Condominium Assn., Inc.
2017 NY Slip Op 32930(U)
September 20, 2017
Supreme Court, Erie County
Docket Number: 2017-805956
Judge: Timothy J. Walker

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

SHERI SCAVONE and MARY MAGNAN,
Individually and on behalf of N.S. and R.S., nee S.S., minors,

Plaintiffs,

- against

DECISION AND ORDER
INDEX NO. 2017-805956

CAMPBELL MEADOWS CONDOMINIUM ASSOCIATION, INC., ET. Al.,

Defendants.

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **KENNEY SHELTON LIPTAK NOWAK, LLP**
Patrick McNelis, Esq., Of Counsel
Attorneys for Plaintiffs

DEMARIE & SCHOENBORN, P.C.
Joseph DeMarie, Esq., Of Counsel
Attorneys for Defendants

WALKER, J.

Plaintiffs have applied, pursuant to CPLR §§3211(a)(2) and 3211(b), to dismiss Defendants' counterclaim and certain of their affirmative defenses. Defendants have cross-moved, pursuant to CPLR §6313, for an order requiring Plaintiffs to post an undertaking.

FACTUAL BACKGROUND

Plaintiffs Sheri Scavone and Mary Magnan are the adoptive parents and guardians of N.S. and R.S., nee S.S., their minor children (the "Children"). Plaintiff and the Children reside at Campbell Meadows, a condominium development established by Defendant, Ranch View, LLC,

and governed by Defendant, Campbell Meadows Condominium Association, Inc. (the "Association"), located in Getzville, New York.

The Children are twin siblings, and Plaintiffs contend that they have been "diagnosed with several psychological conditions and/or disorders" (Complaint, ¶7). Plaintiffs further contend that such disorders have "severely impaired [the Children's] ability to cope with conflict, stress, and/or distress" (*Id.*). In light of their conditions and/or disorders, the Children "experience[ ] repeated and frequent episodes of acute anxiety and/or distress" . . . [which result in] "self-harming behaviors (including cutting oneself), elopement behaviors, severe depression, and other high risk and/or dangerous responses" (*Id.*, at ¶¶ 10 and 13).

Part of the prescribed treatment plan for the Children is for them to have "immediate access to a basketball hoop, as participating in basketball related activities serves to de-escalate the [C]hildren during episodes wherein either child's psychological condition becomes acute" (*Id.*, at ¶15).

Plaintiffs contend that, *inter alia*, the Association's refusal to permit the installation of a basketball hoop at their residence violates the Fair Housing Act, 42 U.S.C. §3601, *et seq.*, and the New York Human Rights Law (Executive Law, §290, *et. seq.*).

STANDARD OF REVIEW

It is well settled that, in considering a motion to dismiss pursuant to CPLR §3211, the pleading shall be liberally construed (*see* CPLR §3026), and the court shall accept the facts, as alleged in it, as true, and afford the plaintiff (or defendant in the case of a counterclaim) the benefit of every favorable inference (*Leon v. Martinez*, 84 NY2d 83 [1994]). Moreover, the court shall avoid assessing the merits of the pleading or any of its factual allegations and instead

determine only whether the facts as alleged fit within any cognizable legal theory (*Id.*).

It is equally well settled that allegations lacking factual support need not be accepted as true (*Dominski v. Frank Williams and Son, LLC*, 46 AD3d 1443 [4th Dept. 2007]).

ANALYSIS

Defendants' Counterclaim

Defendants' counterclaim seeks reimbursement for attorneys' fees and costs in defending this action (the "Counterclaim").

Assuming Defendants prevail on the merits, they will be unable to show an entitlement to attorneys' fees, because the action is not "frivolous, unreasonable, or without foundation" (*Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 [1978]).

On June 9, 2017, this Court granted a preliminary injunction in favor of Plaintiffs, compelling the Defendants to return to Plaintiffs' residence "the portable basketball hoop the Association removed" and otherwise enjoining them "from removing and/or otherwise interfering with the use and enjoyment of the portable basketball hoop by [P]laintiffs" (the "Preliminary Injunction").

In light of this Court having previously found that Plaintiffs satisfied the requirements for a preliminary injunction, by clear and convincing evidence (*see Eastman Kodak Co. v. Carmosino*, 77 A.D.3d 1434, 1435 [4th Dept 2010]), the action is not "frivolous, unreasonable, or without foundation", within the meaning of *Christianburg Garment Co, supra.*

In addition, the Association's bylaws cannot establish a claim for attorneys' fees based on the provision that Plaintiffs "have caused [the Association] to expend monies needed to operate and maintain the complex" (Answer, ¶22).

A homeowner's association cannot, by contract, supercede civil rights granted by federal legislation (*see Scoogins v. Lee's Crossing Homeowners Ass'n*, 718 F3d 262 [4th Cir. 2013]). Courts refuse to enforce such provisions, because doing so "would have the natural and counterproductive effect of dissuading individuals from filing [a Fair Housing Act] lawsuit when they have a reasonable basis on which to assert their claims" (*Id.*, at 276).

Finally, the Court notes that Defendants did not oppose Plaintiffs' motion to dismiss the Counterclaim.

The First and Second Affirmative Defenses (Condition Precedent)

The First Affirmative Defense states that Plaintiffs failed to exhaust administrative remedies, as required by 42 U.S.C. §3610. Similarly, the Second Affirmative Defense states that Plaintiffs failed to exhaust administrative remedies, as required by §297 of the New York Executive Law.

Neither affirmative defense provides a valid defense to the action, because the administrative remedies available under the relevant federal and state statutory schemes are elective and not mandatory to commencing a lawsuit. Under the federal scheme, "an aggrieved person may commence a civil action . . . whether or not a complaint has been filed under section 3610(a) of this title and without regard to the status of such complaint . . . (42 U.S.C. §3613[a][2]).

Likewise, the Human Rights Law provides that a person may "at any time prior to a hearing before a hearing examiner . . . request that the division dismiss the complaint and annul his or her election of remedies so that the human rights law claim may be pursued in court . . . (Executive Law §297[9]; *see also, Butler v. New York Health and Racquet Club*, 768 F.Supp.2d

516 [S.D.N.Y. 2011] [Human Rights Law contains no requirement of exhaustion of administration of remedies]).

Third Affirmative Defense (Statute of Limitations)

The Third Affirmative Defense states that the claims are time-barred, because the Association denied Plaintiff's May 30, 2015 request for an accommodation, and an "action to correct that denial was required to have been commenced within one year from the denial pursuant to the CPLR" (Answer, Third Affirmative Defense, mischaracterized as Third "Cause of Action").

Neither the Answer, nor Defendants' submission opposing the motion to dismiss identify the CPLR provision to which Defendants refer. Moreover, it is unlikely that any deadline would be measured from the making of the application (as Defendants suggest), as opposed to its denial. The record is not clear as to when the application was actually denied.

In addition, the Third Affirmative Defense directly contradicts 42 U.S.C. §3613(a)(1)(A), which provides that "an aggrieved person may commence a civil action in an appropriate . . . state court not later than two years after the occurrence of an alleged discriminatory housing practice."

Finally, Plaintiffs made a subsequent application for an accommodation to the Association, which was denied on April 25, 2017, and Plaintiffs commenced the instant action less than two (2) weeks later, on May 4, 2017. There is no law or rule mandating that requests for disability-related accommodations can be made only once.

Fourth Affirmative Defense (Knowledge of Bylaws)

The Fourth Affirmative Defense states that Plaintiffs are precluded from proceeding with

this action based on their purported knowledge of the Association's bylaw restrictions relating to portable basketball hoops.

It is well settled that,

> [t]o state a *prima facie* case for discrimination based on a failure to reasonably accommodate, a plaintiff must demonstrate that: (1) he suffers from a handicap as defined by the FHAA [or a disability as defined by the ADA and Rehabilitation Act]; (2) the defendant knew or reasonably should have known of the plaintiff's handicap [or disability]; (3) accommodation of the handicap [or disability] 'may be necessary' to afford plaintiff an equal opportunity to use and enjoy the dwelling; and (4) defendants refused to make such accommodation (*Logan v. Matveevskii*, 57 F.Supp3d 234, 256 [S.D.N.Y. 2014]).

Accordingly, Plaintiffs' knowledge of the applicable bylaws is irrelevant. The Association, through its bylaws, may not infringe upon a handicapped person's rights, as guaranteed by the Fair Housing Act and the Human Rights Law.

Sixth and Seventh Affirmative Defenses (Standing)

The Sixth Affirmative Defense states that Plaintiff Magnan lacks standing, because she is neither an owner, shareholder, or recognized tenant of the Association. Similarly, the Seventh Affirmative Defense states that Defendants' actions were reasonable, in part, because Plaintiffs N.S. and R.S., nee S.S., will have no rights under the Fair Housing Act and the Human Rights Law as of January 5, 2018, when they reach the age of majority.

These affirmative defenses are based on the Fair Housing Act's definition of "familial status" at 42 U.S.C. §3602[k], which provides as follows:

> "Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with--
>
> (1) a parent or another person having legal custody of such individual or individuals; or

> (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.
>
> The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

Defendants' reliance on the definition is misplaced. The definition applies to claims made in connection with an alleged violation of 42 U.S.C. §3604(a)-(e), pertaining to alleged discrimination on the basis of race, color, religion, sex, familial status, or national origin.

However, Plaintiffs are not proceeding according to §3604(a)-(e), and their claims are not grounded in "race, color, religion, sex, familial status, or national origin." Rather, Plaintiffs seek relief for the Defendants' purported discrimination on the basis of disability, in violation of 42 U.S.C. §3604(f). "Familial status" is irrelevant to a determination under §3604(f). Accordingly, the date when the Children reach the age of majority is likewise irrelevant to this action and has no bearing on their rights under the Fair Housing Act (or the Human Rights Law).

Moreover, the Fair Housing Act, as it relates to disability-based discrimination, grants protection to the following persons: buyers and renters (42 U.S.C. §3604[f][1][A]); persons residing in or intending to reside in the dwelling bought or rented (42 U.S.C. §3604[f][1][B]); and any person **associated** with that buyer or renter (42 U.S.C. §3604[f][1][C]). Clearly, Plaintiff Magnan and the Children are "associated with" Plaintiff Scavone, and the Children reside with her.

The Cross-Motion

On August 23, 2017, the Appellate Division, Fourth Department, issued an Order denying a stay of the Preliminary Injunction "without prejudice to an application to affix an undertaking

in Supreme Court (*see* CPLR §6312[b])."

The Appellate Order did not mandate that Plaintiffs post an undertaking. Rather, it simply permitted Defendants to request one.

As previously discussed, Defendants' Counterclaim for attorneys' fees should be dismissed. Defendants have provided no other basis on which to require Plaintiffs to post an undertaking.

In light of the foregoing, it is hereby

ORDERED, that Plaintiffs' motion to dismiss is granted; and it is further

ORDERED, that Defendants' cross-motion for an order requiring Plaintiffs to post an undertaking is denied.

This constitutes the Decision and Order of this Court. Submission of an order by the parties is not necessary. The delivery of a copy of this Decision and Order by this Court **shall** constitute notice of entry.

Dated: September 20, 2017
Buffalo, New York

HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice

GRANTED

SEP 20 2017

BY _____
JOHN H. GARBO, JR.
COURT CLERK